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Mayles v. Shoney's, Inc.: Comment on Recent Developments in Mandolidis Actions

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I. INTRODUCTION

Since its enactment in 1913,[1] the West Virginia Workers' Compensation Act[2] has provided employers with immunity from common law tort actions brought by their employees for work related injuries.[3] The primary exception to this immunity has always been for

1. 1913 W. Va. Acts 64.
2. W. VA. CODE §§ 23-1-1 to 6-1 (1985 & Supp. 1991).
3. W. VA. CODE § 23-2-6 (1985).

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injuries caused by the "deliberate intention" of the employer.[4] In *Mayles v. Shoney's, Inc.*,[5] the West Virginia Supreme Court of Appeals established a judicial definition of "deliberate intention" which will affect the legal rights of both employees who suffer work related injuries and their employers.

The holding in *Mayles*, by broadening the definition of "deliberate intention," reduces the range and extent of an employer's immunity from private tort liability for work related injuries suffered by its employees.[6] Additionally, the *Mayles* holding may make it less likely that a defendant employer will be granted summary judgment in actions brought by injured employees.[7] In a broader range of circumstances, workers will not be limited to recovery solely through the West Virginia Workers' Compensation system and will be allowed to maintain private tort actions against their employers.[8]

For the second time in twelve years[9], the West Virginia Supreme Court of Appeals has interpreted the "deliberate intention" exception[10] to the statutory immunity granted employers for work related injuries[11] as being much broader than the statutory language creating the exception would appear to contemplate. While reasonable minds may differ as to the wisdom of the policy established by *Mayles*, this Article will argue that the court has gone beyond its proper role of reasonably interpreting statutes enacted by the West Virginia Legislature. In doing so, the court has encroached upon the legislature's authority to make law by statutory enactment.

This Article will also analyze the *Mayles* opinion in an attempt to aid practitioners in determining just where the new boundaries of the "deliberate intention" exception have been drawn. Although the ambiguity of the court's opinion in many crucial areas renders any attempt to draw clear and coherent distinctions highly specu-

4. W. VA. CODE § 23-4-2(c) (Supp. 1991).
5. 405 S.E.2d 15 (W. Va. 1990).
6. *Id.* at 23.
7. *Id.* at 25-26 (Neely, J., dissenting).
8. *Id.*
9. *See* Mandolidis v. Elkins Indus., 246 S.E.2d 907 (W. Va. 1978).
10. W. VA. CODE § 23-4-2(c)(2) (Supp. 1991).
11. W. VA. CODE § 23-2-6 (1985).

lative, some general conclusions as to the ramifications of *Mayles* can be offered. Additionally, this Article will compare the holding of the *Mayles* opinion to the law of other jurisdictions. Finally, this article will evaluate the court's opinion and suggest language for a statutory amendment which would accomplish the legislative intent of *W. Va. Code* § 23-4-2 as amended and reenacted in 1983.[12] The suggested language is consciously intended to be as resistant as possible to overbroad interpretation.

II. BACKGROUND: PRIOR LAW IN WEST VIRGINIA

A. Employers' Statutory Immunity From Liability Under The West Virginia Workers' Compensation Act

The West Virginia Workmens' [now, Workers'] Compensation Act was originally enacted in 1913.[13] The Act was intended to serve the dual, and sometimes conflicting, purposes of insulating employers from the vagaries and unpredictability of the civil tort action and of providing injured workers with a convenient and efficient means of seeking redress for their injuries.[14] The Act specifically granted employers immunity from private tort liability for work related injuries suffered by employees,[15] unless the injuries occurred as a result of the "deliberate intention" of the employer to injure the employee.[16]

B. The "Deliberate Intention" Exception To Employers' Immunity Prior To Mandolidis

For sixty-five years this "deliberate intention" exception was narrowly construed.[17] Throughout this period the West Virginia Supreme Court of Appeals required injured employees to show that work related injuries were inflicted purposefully, wilfully, and with

12. 1983 W. Va. Acts 1040.

13. 1913 W. Va. Acts 64.

14. *See* 1 ARTHUR LARSON, LARSON'S WORKMEN'S COMPENSATION LAW § 1.20 (10th ed. 1990).

15. W. VA. CODE § 23-2-6 (1985).

16. W. VA. CODE § 23-4-2(c)(2) (Supp. 1991).

17. *See, e.g.*, Eisnaugle v. Booth, 226 S.E.2d 259 (W. Va. 1976); Brewer v. Appalachian Constructors, 65 S.E.2d 87 (W. Va. 1951); Allen v. Raleigh-Wyoming Mining Co., 186 S.E. 612 (W. Va. 1936); Maynard v. Island Creek Coal Co., 175 S.E. 70 (W. Va. 1934).

a specific intent to cause the injury.[18] Negligence of any degree, or even the willful, wanton, and reckless conduct of an employer, was not sufficient to bring the conduct within the "deliberate intention" exception.[19] Moreover, an injured employee was usually required to show a specific intent of the employer to cause the injury.[20]

C. Mandolidis

In 1978, in *Mandolidis v. Elkins Indus.*,[21] the West Virginia Supreme Court of Appeals departed from precedent and held that "willful, wanton, or reckless" conduct which resulted in a work related injury fell within the "deliberate intention" exception and subjected an employer to tort liability.[22] As was noted by the West Virginia Supreme Court of Appeals in *Mandolidis*, the conceptual framework used in previous cases interpreting and applying the "deliberate intention" exception was largely borrowed from the criminal law.[23] Although "willful, wanton or reckless" was language associated with recklessness or gross negligence,[24] the *Mandolidis* court held that such conduct would henceforth establish "deliberate intention."[25] The court asserted that the language used in the criminal law to describe and explain the concepts of intent, recklessness, and negligence were not applicable to the issues involved in determining immunity under the Workers' Compensation Act.[26] The Court made little attempt to explain or justify this assertion.[27] Furthermore, the court did not fully acknowledge that its decision represented a

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18. *See, e.g.*, Eisnaugle v. Booth, 226 S.E.2d 259 (W. Va. 1976); Brewer v. Appalachian Constructors, 65 S.E.2d 87 (W. Va. 1951); Allen v. Raleigh-Wyoming Mining Co., 186 S.E. 612 (W. Va. 1936); Maynard v. Island Creek Coal Co., 175 S.E 70 (W. Va. 1934).

19. *Eisnaugle*, 226 S.E.2d at 261; *Allen*, 186 S.E. at 613-14. *But see* Collins v. Dravo Contracting Co., 171 S.E. 757 (W. Va. 1933) (suggests showing of less than specific intent may suffice to establish "deliberate intention").

20. *See, e.g.*, *Eisnaugle*, 226 S.E.2d 259; *Allen*, 186 S.E. 612.

21. 246 S.E.2d 907 (W. Va. 1978). This case involved three lower court cases consolidated for appeal, but, unless otherwise noted, the discussion in this Article will center on the facts of the case involving Mr. Mandolidis and his employer.

22. *Id.* at 914.

23. *Id.* at 912-13.

24. *See* RESTATEMENT (SECOND) OF TORTS § 500 (1965) (defining reckless disregard which the *Restatement* equates with gross negligence).

25. *Mandolidis*, 246 S.E.2d at 914.

26. *Id.* at 913.

27. *See id.*

departure from the precedents which had previously defined and applied these terms in civil tort actions.[28] The majority in *Mandolidis* chose to establish a new precedent which specifically held that "willful, wanton or reckless" conduct sufficed to extinguish an employers immunity.[29]

Justice Miller, in his concurrence, suggested that under the specific facts presented by *Mandolidis*, Mr. Mandolidis, the employee, was entitled to maintain a private tort action under the then existing definition of "deliberate intention."[30] Justice Miller further suggested that the court had not actually broadened the "deliberate intention" exception, but had only found that the employer's conduct was so egregious and reflected such an extreme degree of willful indifference to the safety of its employee as to constitute intentional conduct.[31] Justice Miller pointed to *Collins v. Dravo Contracting Co.*,[32] as establishing the precedent for this view and stated that he did not consider *Mandolidis* to be a departure from previous law.[33]

However, in *Collins*, the court had merely held that where an an employer had specific knowledge of a substantial risk it *might be possible* for an employee to prove "deliberate intention."[34] The *Collins* court did not hold that willful, wanton, and reckless conduct established "deliberate intention."[35] The *Collins* court merely held that, where an employer's specific knowledge of the risk is shown, a plaintiff employee might be able to present circumstantial evidence from which the trier of fact could infer "deliberate intention."[36]

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28. *Id. But see* RESTATEMENT (SECOND) OF TORTS §§ 8A, 500 (1965) The court asserts that the *Restatement* definition of intent is coextensive with West Virginia law, but the *Restatement* states that intent denotes that the actor desires the consequences or believes that the consequences are substantially certain to result, whereas recklessness does not require that the actor desire the consequences or that the actor believe the consequences are substantially certain to result.

29. *Mandolidis*, 246 S.E.2d at 914.

30. *Id.* at 926.

31. *Id.*

32. 171 S.E. 757 (W. Va. 1933).

33. *Mandolidis*, 246 S.E.2d at 926 (Miller, J., concurring).

34. *Collins*, 171 S.E. at 759.

35. *Id.*

36. *Id.*

D. *The Legislative Response To* Mandolidis*: The Amendment Of* West Virginia Code § 23-4-2

The West Virginia Legislature responded to *Mandolidis*, in 1983, by amending *W. Va. Code* § 23-4-2.[37] This amendment was specifically intended to obviate the precedent established by the *Mandolidis* decision, as is apparent from the statutory language.[38] The amended section now includes language which explicitly and unambiguously states that "willful, wanton, or reckless" conduct, standing alone, is not sufficient to destroy an employer's statutory immunity under the West Virginia Workers' Compensation Act.[39] Additionally, the amendment established a five-part test which must be satisfied in order for an employer to lose immunity.[40] As the amended statute now explicitly states that "willful, wanton, or reckless" conduct does not subject an employer to tort liability, interpreting the "deliberate intention" exception more broadly than it was interpreted prior to the amendment is unreasonable.[41]

E. *Subsequent Interpretations Of* West Virginia Code § 23-4-2 *Prior To* Mayles

Indeed, prior to *Mayles*, the West Virginia Supreme Court of Appeals never asserted that the 1983 amendment had, even inadvertently, expanded the "deliberate intention" exception.[42] Before

37. 1983 W. Va. Acts 1040.

38. *See* W. VA. CODE § 23-4-2(c) (Supp. 1991).

39. W. VA. CODE § 23-4-2(c)(2)(i) (Supp. 1991).

40. W. VA. CODE § 23-4-2(c)(2)(ii) (Supp. 1991).

41. *See* Mayles v. Shoney's, Inc., 405 S.E.2d 15, 26 (W. Va. 1990) (Neely, J., dissenting). That the purpose of the amendment to narrow the "deliberate intention" exception was fully understood at the time of its passage in 1983. In fact, the International Executive Board of the United Mineworkers of America, calling the amendment "anti-union," cited its passage as a primary reason for rejecting Charleston, West Virginia as the site for the UMW's 1983 convention. *See UMW to Hold Convention in Pittsbugh*, UPI, Mar. 8, 1983, *available in* LEXIS, Nexis Library, UPI file.

42. *See* Beard v. Beckley Coal Mining Co., 396 S.E.2d 447 (W. Va. 1990); Dunn v. Consolidation Coal Co., 379 S.E.2d 485 (W. Va. 1989) (cases decided under the five-part "deliberate intention" exception set forth in the 1983 amendment to § 23-4-2 nowhere suggesting that the five-part test establishes a broader exception to employers' immunity than existed under *Mandolidis* prior to the 1983 amendment); *see also* Duty v. Walker, 375 S.E.2d 781 (W. Va. 1988); Miller v. Gibson, 355 S.E.2d 28 (W. Va. 1987); Delp v. Itmann Coal Co., 342 S.E.2d 219 (W. Va. 1986); Deller v. Naymick, 342 S.E.2d 73 (W. Va. 1985); Mooney v. Eastern Associated Coal Corp., 326 S.E.2d 427 (W. Va. 1984) (all involved actions which arose prior to the 1983 amendment, but all mentioned that § 23-4-2 had since been amended and nowhere suggested that the 1983 amendment had broadened the "deliberate intention" exception).

Mayles, the court had not specifically set forth what was required to satisfy the five-part test of *W. Va. Code* § 23-4-2(c)(2)(ii).[43] However, previous opinions by the West Virginia Supreme Court of Appeals discussed the provisions of *W. Va. Code* § 23-4-2(c)(2)(ii) without even suggesting that the the five-part test created a broader "deliberate intention" exception than had *Mandolidis*.[44] Thus, the idea that the five-part test created a broader exception than existed prior to its adoption lacks even indirect support from prior decisions.

Interestingly, in *Mayles*, the court discussed the interpretation of *W. Va. Code* § 23-4-2(c) that the Fourth Circuit Court of Appeals set forth in *Handley v. Union Carbide Corp.* in 1986,[45] but then reached a conclusion seemingly irreconcilable with the Fourth Circuit's interpretation. In *Handley*,[46] the Fourth Circuit noted the controversy occasioned by the *Mandolidis* opinion and stated that "the West Virginia Legislature amended the compensation statute with the express intent of modifying the standard adopted in *Mandolidis*."[47] The Fourth Circuit also stated that "[t]he statute amending [*W. Va. Code* § 23-4-2] is structured to *restrict* recovery for conduct that was previously actionable under the *Mandolidis* rationale. This new legislation specifically eliminates the most frequently relied upon bases for proving 'deliberate intent' under *Mandolidis*, *i.e.*, gross negligence or willful, wanton, and reckless employer misconduct."[48]

Of course, the West Virginia Supreme Court of Appeals is not bound by the interpretations of state law developed by the federal courts.[49] However, one cannot help but wonder how the seemingly

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43. *Mayles*, 405 S.E.2d at 20.

44. *See*, Beard v. Beckley Coal Mining Co., 396 S.E.2d 447 (W. Va. 1990); Dunn v. Consolidation Coal Co., 379 S.E.2d 485 (W. Va. 1989); Duty v. Walker, 375 S.E.2d 781 (W. Va. 1988); Miller v. Gibson, 355 S.E.2d 28 (W. Va. 1987); Delp v. Itmann Coal Co., 342 S.E.2d 219 (W. Va. 1986); Deller v. Naymick, 342 S.E.2d 73 (W. Va. 1985); Mooney v. Eastern Associated Coal Corp., 326 S.E.2d 427 (W. Va. 1984).

45. *Mayles*, 405 S.E.2d at 19 (citing Handley v. Union Carbide Corp., 804 F.2d 265 (4th Cir. 1986)).

46. Handley v. Union Carbide Corp., 804 F.2d 265 (4th Cir. 1986).

47. *Id.* at 269.

48. *Id.* at 273 (emphasis added).

49. Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496, 499-500 (1941).

self-evident conclusions reached by the Fourth Circuit were rejected by the *Mayles* majority.[50] The *Mayles* opinion is of little assistance in exposing the court's reasoning processes because it does not contain a comprehensive analysis of *W. Va. Code* § 23-4-2. Instead, the court based its holding solely upon a very questionable reading of *W. Va. Code* § 23-4-2(c)(2)(ii).[51]

The *Mayles* opinion, authored by Justice Workman and filed December 20, 1990,[52] appears to ignore the intent and purposes of the 1983 amendment of *W. Va. Code* § 23-4-2 by declaring that the amendment of this section did indeed broaden the "deliberate intention" exception to employer immunity.[53] This decision, if not addressed by further amendment of *W. Va. Code* § 23-4-2, is almost certain to give rise to increased civil litigation. Undoubtedly, numerous actions will be filed on behalf of persons suffering work related injuries by lawyers who previously would have assumed that such claims were barred by the plain language of § 23-4-2.

III. *MAYLES V. SHONEY'S, INC.*

A. Statement Of The Case

This case arose from the events of April 4, 1984, at Captain D's restaurant in Star City, West Virginia.[54] Captain D's was and is owned and operated by Shoney's, Incorporated.[55] Timothy Mayles was employed as a fry cook at Captain D's and was seriously injured when a bucket of hot cooking grease, which he was carrying to a disposal bin, spilled upon him causing severe burns.[56] Mr. Mayles was carrying the hot grease in an open container.[57] To reach the disposal bin, Mr. Mayles chose to walk down a grassy slope, which

50. *See Mayles*, 405 S.E.2d at 23.
51. *Id.* at 21-23.
52. *Id.* at 15-16.
53. *Id.* at 23.
54. *Id.* at 16.
55. *Id.*
56. *Id.*
57. *Id.*

had been made wet and slippery by recent rains.[58] He lost his balance and fell, causing the hot grease to spill.[59]

At trial, Mr. Mayles testified that his employment duties included disposal of used grease from the fryers and grease bins used to deep-fry foods.[60] Mr. Mayles also stated that he received no training relating to the disposal of used grease except for being told by the manager to observe other employees and follow their lead.[61] Mr. Mayles testified that he had observed other employees discard the grease by pouring it into a five-gallon container with two handles.[62] He further testified that the employees he observed did not wait for the grease to cool, but instead, immediately carried the hot grease out the back door of the restaurant and down the slope to the disposal bin.[63] Mr. Mayles also testified that no one told him to wait for the grease to cool before carrying it to the disposal bin.[64] However, Mr. Mayles admitted that the grease was cold on the only other occasion on which he had personally disposed of the grease.[65]

Mr. Mayles' testimony as to the prevailing practice at the restaurant for disposing of the grease was corroborated by two fellow employees, one of whom was Mr. Mayles' cousin.[66] More significantly, Terry Franks, a former manager of the restaurant who was employed as the dining room supervisor when Mr. Mayles was hired, testified that the restaurant's policy was to dump the grease while it was hot.[67] Ms. Franks also spoke of a "get it done now" atmosphere which prevailed at the restaurant.[68] Ms. Franks testified that other restaurant employees had previously told her that it was dangerous to carry hot grease down the grassy slope to the disposal bin.[69] Ms. Franks also stated that she knew an employee had once

58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.* at 16-17.
64. *Id.* at 16.
65. *Id.* at 17.
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*

been injured carrying a container of hot grease down the grassy slope.[70] However, Fred Hunt succeeded her as manager and was serving as manager of the restaurant when Mr. Mayles was injured.[71] Ms. Franks admitted she never told Mr. Hunt of the employees' concerns about the danger of disposing of hot grease.[72]

Mr. Hunt testified at trial for the defendant, Shoney's Inc., and denied that he instructed Mr. Mayles just to watch other employees dispose of the grease and follow their lead.[73] Mr. Hunt testified that he personally reviewed all written company policies and procedures with Mr. Mayles and that he personally trained Mr. Mayles in how to dispose of the grease.[74] Furthermore, Mr. Hunt testified that he required the grease to be cooled, either in the freezer or in the storage room, before being carried to the disposal bin.[75] He also testified that when he and Mr. Mayles had disposed of grease together one day, the grease was cold and an alternate route which did not involve traversing the grassy slope was used.[76] However, Mr. Hunt admitted that he had heard rumors that employees were discarding grease while it was still hot but that he took no action to prevent this practice until after Mr. Mayles was injured.[77] Mr. Hunt also testified that although he did not see Mr. Mayles disposing of the grease on the day of the accident, he did hear about Mr. Mayles disposing of the grease.[78] However, Mr. Hunt said he thought that the grease was merely being placed in an area to cool.[79] Mr. Hunt also testified that he was never informed that, prior to his becoming manager, another employee had been injured carrying grease to the disposal bin.[80]

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70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.* at 18.
74. *Id.* at 17-18.
75. *Id.* at 18.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*

B. Opinion Of The Court: The Court's Interpretation And Application Of The Five-Part Test

Mr. Mayles brought an action in the Circuit Court of Kanawha County seeking damages for the injuries he suffered in the April 4, 1984 incident.[81] Judgment on a jury verdict awarding $220,000 to the plaintiff, Mr. Mayles, was entered on February 2, 1989 by final order of the circuit court.[82] The defendant, Shoney's Inc., appealed this final order to the West Virginia Supreme Court of Appeals, alleging, inter alia, that the following errors were committed by the circuit court:

> 1) the trial court allowed the jury to decide a case which did not satisfy the mandatory five-factor test set forth in West Virginia Code § 23-4-2(c)(2)(ii) governing Mandolidis cases [in that t]he case may have satisfied a standard for ordinary negligence or carelessness but did not come close to the requirements set forth in said statute for proof of 'deliberate intent', and therefore, should not have been allowed to go to the jury;
> 2) the court, over appellant's objection, gave an instruction that advised the jury that in order to show deliberate intent, the appellee 'need only prove' each of the five statutory elements in Code § 23-4-2(c)(2) (ii), whereas the statutory language is that the 'requirement [proof of deliberate intent] may be satisfied only if [certain requirements are met]'; . . . .[83]

The West Virginia Supreme Court of Appeals, in a three to two decision with Justices Neely and Brotherton dissenting, found no error was committed by the lower court and affirmed the decision.[84]

The court's opinion, by Justice Workman, rested upon what is certain to be a highly controversial and hotly contested interpretation of the controlling statute, *W. Va. Code* § 23-4-2(C), which reads, in pertinent part:

> (1) It is declared that enactment of this chapter and the establishment of the workers' compensation system in this chapter was and is intended to remove from the common law tort system all disputes between or among employers and employees regarding the compensation to be received for injury or death to an employee except as herein expressly provided, and to establish a system which

81. *Id.* at 16.
82. *Id.*
83. *Id.*
84. *Id.*

compensates even though the injury or death of an employee may be caused by his own fault or the fault of a co-employee; that the immunity established in sections six and six-a [§§ 23-2-6 and 23-2-6a], article two of this chapter, is an essential aspect of this workers' compensation system; that the intent of the legislature in providing immunity from common law suit was and is to protect those so immunized from litigation outside the workers' compensation system except as herein expressly provided; that, in enacting the immunity provisions of this chapter, *the Legislature intended to create a legislative standard for loss of that immunity of more narrow application and containing more specific mandatory elements than the common law tort system concept and standard of willful, wanton and reckless misconduct*; and that it was and is the legislative intent to promote prompt judicial resolution of the question of whether a suit prosecuted under the asserted authority of this section [§ 23-4-2] is or is not prohibited by the immunity granted under this chapter.

(2) The immunity from suit provided under this section and under section six-a, article two of this chapter, may be lost only if the employer or person against whom liability is asserted acted with "deliberate intention." This requirement may be satisfied only if:

(i) It is proved that such employer or person against whom liability is asserted acted with a consciously, subjectively and deliberately formed intention to produce the specific result of injury or death to an employee. This standard requires a showing of an actual, specific intent and may not be satisfied by allegation or proof of (A) Conduct which produces a result that was not specifically intended; (B) conduct which constitutes negligence, no matter how gross or aggravated; or (C) willful, wanton or reckless misconduct; *or*

(ii) The trier of fact determines, either through specific findings of fact made by the court in a trial without a jury, or through special interrogatories to the jury in a jury trial, that all of the following facts are proven:

(A) That a specific unsafe working condition existed in the workplace which presented a high degree of risk and a strong probability of serious injury or death;

(B) That the employer had a subjective realization and an appreciation of the existence of such specific unsafe working condition and the high degree of risk and the strong probability of serious injury or death presented by such specific unsafe working condition;

(C) That such specific unsafe working condition was a violation of a state or federal safety statute, rule or regulation, whether cited or not, or of a commonly accepted and well-known safety standard within the industry or business of such employer, which statute, rule, regulation or standard was specifically applicable to the particular work and working condition involved, as contrasted with a statute, rule, regulation or standard generally requiring safe workplaces, equipment or working conditions;

(D) That notwithstanding the existence of the facts set forth in subparagraphs (A) through (C) hereof, such employer nevertheless thereafter exposed an employee to such specific unsafe working condition intentionally; and

(E) That such employee so exposed suffered serious injury or death as direct and proximate result of such unsafe working condition.[85]

85. W. VA. CODE § 23-4-2(c) (Supp. 1991) (emphasis added).

Given that paragraphs (i) and (ii) of § 23-4-2(c)(2) are joined by the disjunctive "or," the West Virginia Supreme Court, following *Handley*,[86] held that § 23-4-2(c)(2) sets forth alternative means of proving "deliberate intention."[87] The requirement set forth in paragraph (i) that an actual, specific intent to injure or kill an employee be proved, regardless of the extent of an employer's negligence or recklessness,[88] is obviously very unlikely to be met except in the most extraordinary cases. Thus, most future cases are almost certain to hinge on the interpretation and application of the five-part test for proving "deliberate intention"[89] set forth in paragraph (ii). *Mayles* was decided on the basis of the court's interpretation and application of the five-part test.[90] Therefore, *Mayles* has established the parameters of an employer's liability under the "deliberate intention" exception.

The first requirement of the five-part test is the existence of a specific unsafe working condition "which presented a high degree of risk and a strong probability of serious injury or death."[91] The court held that the disposal of hot grease by carrying it in an open container down a grassy slope was a specific working condition presenting a high degree of risk and a strong probability of serious injury.[92] Therefore, the appellee satisfied the first requirement.[93]

The second requirement is that the employer must have "a subjective realization and an appreciation of the existence of such specific unsafe working condition and of the high degree of risk and the strong probability of serious injury or death presented by such specific unsafe working condition."[94] The majority declared that this requirement was satisfied.[95] The court did not explain its reasoning on this issue, but did list the evidence it believed supported its con-

86. Handley v. Union Carbide Corp., 804 F.2d 265 (4th Cir. 1986).
87. Mayles v. Shoney's, Inc., 405 S.E.2d 15, 19 (W. Va. 1990).
88. W. VA. CODE § 23-4-2(c)(2)(i) (Supp. 1991).
89. W. VA. CODE § 23-4-2(c)(2)(ii) (Supp. 1991).
90. *Mayles*, 405 S.E.2d at 21-23.
91. W. VA. CODE § 23-4-2(c)(2)(ii)(A) (Supp. 1991).
92. *Mayles*, 405 S.E.2d at 21.
93. *Id.*
94. W. VA. CODE § 23-4-2(c)(2)(ii)(B) (Supp. 1991).
95. *Mayles*, 405 S.E.2d at 22.

clusion.[96] Evidence that a "do everything right now" policy existed at the restaurant was mentioned.[97] The restaurant manager's testimony that he had heard rumors of the grease being discarded while hot but took no action to prevent the rumored practice was also mentioned.[98] The majority also discussed the testimony indicating that it was common practice to dispose of hot grease.[99] Additionally, the court pointed to testimony that employees had previously expressed concern to a previous manager about carrying hot grease.[100] Finally, the court noted that an employee had once been injured carrying hot grease.[101]

The third requirement of the five-part test is that the specific unsafe working condition must constitute "a violation of a state or federal safety statute, rule or regulation, whether cited or not, or of a commonly accepted and well-known safety standard within the industry or business of such employer."[102] The statute, rule, regulation, or standard must be one specifically applicable to the particular unsafe working condition and not merely one generally requiring safe working conditions.[103]

The evidence offered at trial was conflicting as to whether a specific federal rule or regulation was violated. The court based its decision that the third requirement was satisfied on the appellee's expert's testimony.[104] This expert witness testified that the method of disposing of the grease employed by the appellant violated a commonly accepted and well-known safety standard of the restaurant industry.[105] As the appellant offered no evidence to contradict appellee's evidence,[106] the court's finding that this requirement was satisfied cannot be questioned.

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96. *Id.* at 21-22.
97. *Id.* at 21.
98. *Id.*
99. *Id.*
100. *Id.* at 17.
101. *Id.*
102. W. VA. CODE § 23-4-2(c)(2)(ii)(C) (Supp. 1991).
103. *Id.*
104. *Mayles*, 405 S.E.2d at 22.
105. *Id.*
106. *Id.*

The fourth requirement of the five-part test is that, with the previous requirements having been satisfied, the employer must intentionally expose the employee to the specific unsafe working condition.[107] The court concluded, with next to no analysis or explanation, that this requirement was satisfied.[108] Indeed, the court may have treated this requirement as being merely a restatement of the "subjective realization" requirement.[109] The court mentioned the same evidence in finding this requirement satisfied as it did in finding that the "subjective realization" requirement was satisfied.[110]

The fifth requirement is that a serious injury or death must have been proximately caused by exposure to the specific unsafe working condition.[111] Mr. Mayles suffered severe burns and the proximate cause requirement was not an issue in the case.[112]

Thus, the majority found that Mr. Mayles had presented sufficient evidence to satisfy each element of the five-part test and affirmed the trial court judgment.[113]

C. *Justice Neely's Dissent*

Justice Neely disagreed with the majority's conclusion that Mayles presented sufficient evidence to satify the "subjective realization" and "intentional exposure" requirements of the five-part test.[114] Justice Neely would have ruled that, as a matter of law, these two requirements were not satisfied and would have reversed the circuit court.[115] Saying that its interpretation of the statute was "patently wrong," Justice Neely strongly criticized the majority's holding that the 1983 amendment of *W. Va. Code* § 23-4-2, broadened rather than narrowed the "deliberate intention" exception.[116]

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107. W. VA. CODE § 23-4-2(c)(2)(ii)(D) (Supp. 1991).
108. *Mayles*, 405 S.E.2d at 23.
109. W. VA. CODE § 23-4-2(c)(2)(ii)(B) (Supp. 1991).
110. *Mayles*, 405 S.E.2d at 23.
111. W. VA. CODE § 23-4-2(c)(2)(ii)(E) (Supp. 1991).
112. *Mayles*, 405 S.E.2d at 23.
113. *Id.* at 23.
114. *Id.* at 27-28 (Neely, J., dissenting).
115. *Id.* at 27 (Neely, J., dissenting).
116. *Id.* at 26 (Neely, J., dissenting).

This author agrees with Justice Neely on all the points in the preceding paragraph. However, the other main thrust of the dissent is more problematic. In amending *W. Va. Code* § 23-4-2, the legislature added confusing and perhaps inconsistent language concerning the standards to be applied in determining whether summary judgment for an employer is appropriate.[117] Justice Neely appears to believe that a defendant employer should be granted summary judgment upon a preliminary determination by the trial court that all of the elements of the five-part test are not satisfied.[118] In support of this conclusion, Justice Neely points to the following language in the amended statute: "[I]t was and is the legislative intent to promote prompt judicial resolution of the question of whether a suit prosecuted under the asserted authority of this section [§ 23-4-2] is or is not prohibited by the immunity granted under this chapter."[119]

Although the argument is not clearly articulated in the dissent, Justice Neely appears to believe that this language means the trial court should grant an employer summary judgment whenever an injured employee fails *to prove* to the trial court that all five elements of the five-part test are satisfied.[120] Justice Neely admits that the amended statute, at one point, indicates that the issue of whether the five-part test is satisfied is a question for the trier of fact, but dismisses this language as an isolated anomaly.[121]

This conclusion that the legislature did not intend to have the finder of fact determine the issue of whether the five-part test was satisfied appears unwarranted. The statutory language dismissed as insignificant by Justice Neely is quite unambiguous and detailed.[122] The language at issue states that an employer loses immunity from suit if "*[t]he trier of fact* determines, either through specific findings of fact made by the court in a trial without a jury, or through special interrogatories *to the jury* in a jury trial, that all of the following

117. *See* W. VA. CODE § 23-4-2 (Supp. 1991).
118. *Mayles*, 405 S.E.2d at 27 (Neely, J., dissenting).
119. W. VA. CODE § 23-4-2(c)(1) (Supp. 1991).
120. *Mayles*, 405 S.E.2d at 27 (Neely, J., dissenting).
121. *Id.* at 26 (Neely, J., dissenting).
122. *See* W. VA. CODE § 23-4-2(c)(2)(ii) (Supp. 1991).

facts are proven: [the elements of the five-part test follow]."[123]

Given that this language refers specifically to the trier of fact and sets forth specific alternative procedures to be followed depending on whether or not a jury trial is held, it cannot be dismissed as a mere drafting error. Furthermore, Justice Neely neglects to consider the language of *W. Va. Code* § 23-4-2(c)(2)(iii)(B) which provides in pertinent part:

> Notwithstanding any other provision of law or rule to the contrary, and consistent with the legislative findings of intent to promote prompt judicial resolution of issues of immunity from litigation under this chapter, the court shall dismiss the action *upon motion for summary judgement if it shall find, pursuant to Rule 56 of the Rules of Civil Procedure* that one or more of the facts required to be proved [under the five-part test] do not exist . . . .[124]

Justice Neely would probably argue that this language is consistent with his belief that the trial court should grant summary judgment whenever, in its opinion, the plaintiff fails to prove that all the elements of the five-part test are satisfied. However, given that the statute specifically references Rule 56,[125] the more reasonable interpretation is that the traditional test for summary judgment under Rule 56 should be applied. This interpretation would preclude granting of summary judgment unless no genuine issue of material fact exists as to whether one or more elements of the five-part test are satisfied.[126] This appears to be the approach adopted by the West Virginia Supreme Court of Appeals[127] and is also the approach followed by the Fourth Circuit in *Handley*.[128]

D. Analysis

The West Virginia Supreme Court of Appeals' interpretation of the five-part test for proving "deliberate intention" creates a very broad exception to an employer's statutory immunity for work related injuries. Furthermore, the court's holding in *Mayles* appears

123. *Id.* (emphasis added).
124. W. VA. CODE § 23-4-2(c)(2)(iii)(B) (Supp. 1991) (emphasis added).
125. W. VA. R. CIV. P. 56.
126. *Id.*
127. *Mayles*, 405 S.E.2d at 20-21.
128. *Handley v. Union Carbide Corp.*, 804 F.2d 265 (4th Cir. 1986).

irreconcilable with the statement of legislative intent included in the 1983 amendment of *W. Va. Code* § 23-4-2.[129] This statement of legislative intent is set forth in the same subsection in which the five-part test appears, in the immediately preceding subdivision.[130] The statement of legislative intent, as amended in 1983, contains the following language:

> [I]n enacting the immunity provisions of this chapter, *the Legislature intended to create a legislative standard for loss of that immunity of more narrow application and containing more specific mandatory elements than the common law tort system concept and standard of willful, wanton and reckless misconduct*; and that it was and is the legislative intent to promote prompt judicial resolution of the question of whether a suit prosecuted under the asserted authority of this section [§ 23-4-2] is or is not prohibited by the immunity granted under this chapter.[131]

Perhaps the most fundamental rule of statutory construction is to read provisions relating to the same subject matter together and, if possible, to construe the provisions consistently.[132] In light of this fundamental rule, and considering the emphasized language in § 23-4-2(c)(1), it is remarkable that the *Mayles* majority has interpreted the five-part test in § 23-4-2(c)(2)(ii) to create a broader exception to employers' immunity than existed under *Mandolidis* before the 1983 legislation was enacted. However, this is precisely what the court has done in *Mayles*.[133] As stated in the opinion by Justice Workman:

> Ironically, this is not the sort of case wherein, under all the facts and circumstances, the appellee could probably have prevailed under the extremely narrow concept of deliberate intent enunciated in *Mandolidis*. The reason the appellee would likely have been unsuccessful under *Mandolidis* is because we do not perceive this as the type of injury "result[ing] from wilful, wanton or reckless misconduct. . . . However, the legislature, in an apparent effort to narrow the parameters of civil liability for employers, has indeed broadened the concept by enactment of the five-part test . . . .[134]

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129. 1983 W. Va. Acts 1040.

130. W. VA. CODE § 23-4-2(c)(1) (Supp. 1991).

131. *Id.* (emphasis added).

132. State ex rel. Fetters v. Hott, 318 S.E.2d 446 (W. Va. 1984); Smith v. Workmen's Compensation Comm'r, 219 S.E.2d 361 (W. Va. 1975).

133. *Mayles*, 405 S.E.2d at 23.

134. *Id.*

Beyond dismissing the clear and unambiguous statement of legislative intent set forth by the legislature, this remarkable conclusion rests upon a highly questionable interpretation and application of the express language of the five-part test.[135] Reading the entire section consistently, the most reasonable interpretation of *W. Va. Code* § 23-4-2 is that satisfaction of the five-part test necessarily requires a showing of willful, wanton, and reckless conduct in addition to the other mandatory elements. To demonstrate the tenuous nature of the court's conclusions it is necessary to examine the court's interpretation and application of the "subjective realization" and "intentional exposure" elements of the test.

As pointed out by Justice Neely in dissent, the evidence presented by Mr. Mayles would not appear to demonstrate *subjective* awareness and appreciation.[136] At best, this evidence would tend to show that the appellant should have been aware of the specific unsafe working condition because a reasonable person in its position would have realized and appreciated the existence of the dangerous condition.[137]

None of the evidence offered by the appellee tended to prove that the manager actually knew that any employees were carrying open containers of hot grease to the disposal bin and knew that the employees were thus exposed to a high degree of risk and high probability of serious injury.[138] Furthermore, an alternate route which avoided the grassy slope existed and no testimony was offered suggesting that the manager had even heard rumors that this safer route was not being used.[139] The manager may have been negligent in not investigating the rumors concerning the method of hot grease disposal, but hearing rumors does not give one a *subjective* realization of the existence of the rumored conduct.

The court is apparently willing to allow satisfaction of the "subjective realization" requirement by what appears to be an objective

135. W. VA. CODE § 23-4-2(c)(2)(ii) (Supp. 1991).
136. *Mayles*, 405 S.E.2d at 27.
137. *Id.*
138. *Id.*
139. *Id.* at 16-18.

test, rather than by the subjective test provided by the express language of the statute.[140] Additionally, the court may have interpreted the requirement of "intentional exposure" to be conceptually indistinguishable from the "subjective realization" requirement.[141]

Contrary to the court's conclusion, the evidence introduced at trial does not seem to show that the appellant had a subjective realization or awareness of the specific unsafe working condition.[142] The evidence cannot even arguably be construed as proving or tending to prove that the appellant "intentionally exposed" the employees to the dangers of carrying hot grease down the grassy slope.[143] How the court determined that such evidence could be construed as proving "intentional exposure" cannot be ascertained. With no analysis or discussion, the court merely states as a conclusion that the evidence showed that the appellant intentionally exposed the appellee to the unsafe working condition.[144]

As Justice Neely pointed out in dissent, the restaurant manager never told Mr. Mayles he was to carry hot grease down the grassy slope.[145] The appellant may have been negligent, even "stupid," as stated by Justice Neely.[146] However, the appellant's conduct cannot be construed as requiring employees to risk carrying hot grease down the grassy slope.

The majority may have based its finding that the appellant intentionally exposed the appellee to the unsafe working condition on the following rationale. Where an employer knows or should know of an unsafe working condition, and where it can be inferred that the employer created an "atmosphere" in the workplace which contributed to the employee's decision to expose himself to the unsafe working condition, the employer intentionally exposes the employee to the unsafe working condition, unless it takes affirmative steps to prevent employees from engaging in the unsafe practice.

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140. W. VA. CODE § 23-4-2(c)(2)(ii)(B) (Supp. 1991).
141. *See Mayles*, 405 S.E.2d at 23.
142. *Id.* at 21-22.
143. *Id.* at 23.
144. *Id.*
145. *Id.* at 28 (Neely, J., dissenting).
146. *Id.* at 27 (Neely, J., dissenting).

Needless to say, this standard for proving "intentional exposure" establishes a very low threshold of proof. Neither actual knowledge of the unsafe practice nor purpose and deliberation would be necessary to satisfy this standard.

This interpretation of the "intentional exposure" requirement cannot be reconciled with legislative intent. The requirement of intentional exposure to the unsafe working condition was clearly intended to prevent the court from reestablishing the law of *Mandolidis* by the backdoor, while allowing employees to maintain a civil tort action against an employer in factual situations similar to that presented by Mr. Mandolidis. Mr. Mandolidis' employer's conduct was extraordinarily egregious. Mr. Mandolidis was forced to operate a power saw without a safety guard after other employees had been injured doing so and after he had personally complained about the dangers involved.[147] Furthermore, the employer had been cited by safety officials for operating the saw without a guard and, most significantly, upon complaining, Mr. Mandolidis was told to continue operating the guardless saw or he would be fired.[148] Under such circumstances, a finding that the employer acted with a "deliberate intention" to injure is understandable although not necessarily irresistible. To find "intentional exposure" in the facts presented in *Mayles* is to render the requirement meaningless. Employers may well lose their expected immunity for conduct that does not surpass ordinary negligence. Indeed, as the standard under *Mandolidis* was gross negligence,[149] the court's holding that the 1983 legislation broadened the "deliberate intention" exception[150] compels the conclusion that, under certain circumstances, employers will be liable at common law for injuries caused by ordinary negligence.[151]

The legislature's apparent intent was to restrict liability to circumstances in which an employer's conduct was, at the least, willful, wanton, or reckless, and satisfied the five-part test as well.[152] How-

147. *Mandolidis v. Elkins Indus.*, 246 S.E.2d 907, 916 (W. Va. 1978).
148. *Id.*
149. *Handley*, 804 F.2d at 273.
150. *Mayles*, 405 S.E.2d at 23.
151. *Id.*
152. *See* W. VA. CODE § 23-4-2(c) (Supp. 1991).

ever, the court's application of the "subjective realization" requirement to the facts of this case suggests that where an employer should be aware that a certain working condition presents an unreasonable risk of serious injury, it will be held liable in tort even if its conduct was not willful, wanton, and reckless but merely careless and thoughtless.[153]

It appears that actual knowledge of the risk will not be required where the employer unreasonably fails to act upon information that would cause an ordinary prudent person to suspect that a dangerous condition exists and to conclude that an investigation should be conducted. Apparently, the employer will then be charged with the knowledge or "subjective realization" that a reasonable investigation would have revealed. Furthermore, it appears that the employer will be found to have "intentionally exposed" the employee to an unsafe working condition upon the same showing of facts, if the employee can convince the trier of fact that the employer created or encouraged an "atmosphere" in the workplace which contributed to the employee's decision to engage in an unsafe practice.

Therefore, it appears that under *Mayles* employers will be liable for conduct traditionally considered negligent. The distinctions between negligent conduct and grossly negligent or willful, wanton, and reckless conduct can be difficult to determine.[154] Under West Virginia law, the difference has traditionally been that negligence connotes heedlessness, inattention, or inadvertence, while willfulness and wantoness convey the idea of purpose or design.[155] Gross negligence has been described as a degree of negligence showing an utter disregard of prudence amounting to complete neglect for the safety of another.[156] These descriptions are not always particularly helpful in attempting to classify particular conduct. However, in *Mayles*, no evidence was presented which tended to show that the employer had a purpose or design, either actual or constructive, to expose employees to a condition from which an injury would likely result,

153. *See Mayles*, 405 S.E.2d at 21-22.
154. Kelly v. Checker White Cab, Inc., 50 S.E.2d 888, 892 (W. Va. 1948).
155. *Id.* (quoting Thomas v. Snow, 174 S.E.2d 837, 839 (Va. 1934)).
156. Dodrill v. Young, 102 S.E.2d 724, 730 (W. Va. 1958).

unless one considers fostering a "do it now" atmosphere and maintaining poor supervision as constituting purpose or design. It is also difficult to classify Shoney's management as having shown an utter lack of prudence amounting to complete neglect of Mr. Mayles' safety.

The true significance of *Mayles*, however, does not concern the degree of negligence required to create tort liability. The significance is that negligent conduct may expose an employer to tort liability, despite a statute which would seem to require the existence of certain elements *in addition to* conduct which is willful, wanton, and reckless.[157] Henceforth, injured employees will not have to allege willful, wanton, and reckless conduct to avoid summary judgment and will not have to prove such conduct in order to recover against employers.[158] Given the court's interpretation of the "subjective realization" and "intentional exposure" elements of the five-part test, injured employees will be able to avoid summary judgment by allegations of negligence and of a specific safety violation.

Clearly, the legislature intended to create an exception from immunity for conduct such as that demonstrated in *Mandolidis*. However, just as clearly, the legislature intended to preserve immunity for conduct such as that presented by *Mayles*.[159] To read the statute[160] otherwise is to engage in law-making not statutory interpretation. Not to put too fine a point on it, the court has acted with a "deliberate intention" to contravene express legislative intent and the plain meaning of the controlling statute.

IV. Comparison With Other Jurisdictions

No other state has established an exception to employers' immunity from suit for work related injuries as broad as the one established by *Mayles*.[161] Many states have no "deliberate intention"

157. *See* W. Va. Code § 23-4-2(c) (Supp. 1991).

158. *Mayles*, 405 S.E.2d at 23.

159. *See*, 1983 Journal of the West Virginia House of Delegates, 2150-2154 (statement of Del. Albright).

160. W. Va. Code § 23-4-2 (Supp. 1991).

161. *See*, David B. Harrison, Annotation, *What Conduct Is Willful, Intentional, or Deliberate Within Workmen's Compensation Act Provision Authorizing Tort Action for Such Conduct*, 96 A.L.R.3d 1064 (1979 & Supp. 1991).

exception to employer immunity.[162] Of the states which do have a deliberate intention exception, most require a specific intent to injure, and none has extended the exception further than the West Virginia law after *Mandolidis* and prior to the 1983 legislation.[163] Thus, West Virginia is currently a minority of one in allowing employees to maintain actions when the conduct of the employer constitutes no more than negligence.

Cases from other jurisdictions involve various statutes employing slightly different terminology, but the cases generally fall into two broad groups: (1) those expressing the view that a "deliberate intention" to cause an employee's injury requires a specific intention to cause an injury or death, as opposed to recklessness or gross negligence; and (2) those holding "that deliberate intention" can be shown where an employer's conduct is willful, wanton, or reckless.[164] Generally, the latter jurisdictions are consistent with the West Virginia standard that existed under *Mandolidis* prior to the 1983 amendment of *W. Va. Code* § 23-4-2, in that a showing of willful, wanton, or reckless conduct suffices to establish "deliberate intention."[165]

Finally, in some of the states where no statutory "deliberate intention" exception to employers' immunity under the workers' compensation act exists, case law has been developed holding that, at least under some circumstances, a tort action may be brought against an employer for an "intentional" injury on the grounds that the workmens' compensation act covers only "accidental" injuries.[166] These cases have held that, at least in most circumstances, an "intentional" injury is not "accidental" and thus is not within the purview of the exclusive remedy provisions of the workers' compensation statute.[167] Therefore, in some states which have no statutory exception to the exclusive remedy provisions of the worker's compensation act for "intentional" injuries, the injured employee

162. *Id.* at 1069.
163. *Id.* at 1071-1090.
164. *Id.* at 1068.
165. *Id.* at 1071-1090.
166. *Id.* at 1071.
167. *Id.*

may still be allowed to recover damages outside that act.[168] However, this line of cases appears to uniformly require that the employer have a specific intention to cause an injury.[169]

V. An Evaluation of the Court's Opinion

The policy established by *Mayles* is by no means inherently unreasonable or unfair. Allowing an employee who is seriously injured through the fault of his employer to recover civil damages in addition to workers' compensation benefits may well, in many circumstances, be more equitable than limiting the employee to worker's compensation remedies of medical payments and disability awards. Workers' compensation awards make no allowance for pain and suffering or other nonpecuniary damages[170] and are not overwhelmingly generous. In many instances, an injured worker will recover far less from workers' compensation than a person who suffered an identical injury would recover in a civil action.

Thus, the majority's motivation in *Mayles* could be construed as an altruistic desire to protect injured employees from a system it perceives to be unfair to the employees' interests. On the other hand, some might term it a petulant reaction against a legislature which refused to accept the court's judgment as to the proper policy and set out to obviate the court's *Mandolidis* decision. Likely, both views contain some degree of truth.

However one views the policy established by *Mayles*, the opinion clearly is opposed to the legislative intent of the 1983 amendment to restrict the ability of employees to recover under the "deliberate intention" exception; even the *Mayles* majority concedes as much.[171] Furthermore, strong policy arguments can also be made against the court's holding in *Mayles*. West Virginia has suffered from chronic unemployment in recent years, and many no doubt view it as unwise to establish policies which increase the cost of doing business in this state and make the state a less attractive location for business. Cer-

168. *Id.*
169. *Id.*
170. W. Va. Code § 23-4-3 (1985).
171. *Mayles*, 405 S.E.2d at 23.

tainly, concerns about economic competitiveness, such as those expressed by Justice Neely,[172] should not be blithely dismissed.

A. Probable Ramifications

The West Virginia Legislature made a judgment that restricting an injured employee's ability to recover civil damages from his or her employer was necessary to prevent the larger evil of greater levels of unemployment. The legislature made this judgment despite the possibility that certain individuals might have to bear an unfair portion of the costs of injuries suffered through the fault of their employers.

The argument will no doubt be made that the potential for dire consequences resulting from the *Mayles* decision is exaggerated by the business community and its supporters. Certainly, those who attempt to influence the political decisions of government are not above employing hyperbole. But, even Pollyanna would not suggest that employers and potential employers will not consider the fact that West Virginia now has the broadest exception to employer immunity under workers' compensation when deciding whether to create or retain jobs in West Virginia as opposed to some other location.

Many people will also question whether the West Virginia Supreme Court of Appeals is in as good a position as is the West Virginia Legislature to consider fully all the competing values and interests involved in such policy-making. The West Virginia Legislature is far from infallible. Nevertheless, no reason exists to believe that the court's judgment and ability to make "good" policy is greater than that of the legislature. Therefore, advocacy of another amendment of *W. Va. Code* § 23-4-2 can be expected.

B. A Proposal for New Legislation

The legislature must first decide whether to amend *W. Va. Code* §23-4-2(c) or to allow the *Mayles* decision to stand as the law. Assuming the legislature chooses to amend the statute, it must then decide what it wishes to accomplish by such amendment. The leg-

172. *Id.* at 25 (Neely, J., dissenting).

islature could remove "deliberate intention" exception entirely or it could narrow the exception. The following proposal is premised upon the assumption that the legislature will choose to narrow the exception to the same extent as was intended by the 1983 amendment. In the following proposal, strike-throughs indicate language to be deleted and underscoring indicates new language. Only those subdivisions to be amended are included.

Section 23-4-2(c)

1) It is declared that enactment of this chapter and the establishment of the worker's compensation system in this chapter was and is intended to remove from the common law tort system all disputes between or among employers and employees regarding the compensation to be received for injury or death to an employee except as herein expressly provided, and to establish a system which compensates even though the injury or death of an employee may be caused by his own fault or the fault of a co-employee; that the immunity established in sections six and six- a [§§ 23-2-6 and 23-2-6a], article two of this chapter, is an essential aspect of this workmen's compensation system; that the intent of the legislature in providing immunity from common law suit was and is to protect those so immunized from litigation outside the workmen's compensation system except as herein expressly provided; that, in enacting the immunity provisions of this chapter, the legislature intended to create a legislative standard for loss of that immunity of more narrow application and containing more specific mandatory elements than the common law tort system and standard of willful, wanton and reckless misconduct; and that the legislature intended to require that the legislative standard for loss of that immunity under paragraph (ii), subdivision (2) of this subsection [§ 23-4- 2(c)(2) (ii)] be expressly limited to causes of action in which willful, wanton and reckless conduct exists and, in addition, each of the specific mandatory elements contained therein also exists; and that it was and is the legislative intent to promote prompt judicial resolution of the question of whether a suit prosecuted under the asserted authority of this section [§23-4-2] is or is not prohibited by the immunity granted under this chapter.; provided, however, that this legislative intent to promote prompt judicial resolution is not intended to alter the standard for summary judgment as provided pursuant to Rule 56 of the West Virginia Rules of Civil Procedure.

(2) The immunity from suit provided under this section and under section six-a, article two of this chapter, may be lost only if the employer or person against whom liability is asserted acted with 'deliberate intention.' This requirement may be satisfied only if:

(i) It is proved that such employer or person against whom liability is asserted acted with a consciously, subjectively and deliberately formed intention to produce the specific result of injury or death to an employee. This showing requires a showing of an actual, specific intent and may not be satisfied by allegation or proof of (A) conduct which produces a result that was not specifically

intended; (B) conduct which constitutes negligence, no matter how gross or aggravated; or (C) willful, wanton or reckless misconduct; or

(ii) The trier of fact determines, either through specific findings of fact made by the court in a trial without a jury, or through special interrogatories to the jury in a jury trial, that all of the following facts are proven:

(A) That a specific unsafe working condition existed in the workplace which presented a high degree of risk and a high probability of serious injury or death;

(B) That the employer had ~~a subjective realization~~ actual knowledge and ~~an~~ a subjective appreciation of the existence of such specific unsafe working condition and the high degree of risk and the strong probability of serious injury or death presented by such unsafe working condition;

(C) That such specific unsafe working condition was a violation of a state or federal safety statute, rule or regulation, whether cited or not, or of a commonly accepted and well-known safety standard within the industry or business of such employer, which statute, rule, regulation or standard was specifically applicable to the particular work and working condition involved, as contrasted with a statute, rule, regulation or standard generally requiring safe workplaces, equipment or working conditions;

(D) That notwithstanding the existence of the facts set forth in subparagraphs (A) through (C) hereof, such employer nevertheless thereafter exposed an employee to such specific unsafe working condition intentionally ~~*and was not merely negligent in allowing such exposure*~~; and

(E) That such employee so exposed suffered serious injury or death as direct and proximate result of such unsafe working condition.

(F) That in addition to the existence of the facts set forth in subparagraphs (A) through (E) hereof, the conduct of the employer constituted willful, wanton or reckless misconduct.

(iii) . . . .

(B) Notwithstanding any other provision of law or rule to the contrary, and consistent with the legislative findings of intent to promote prompt judicial resolution of issues of immunity from litigation under this chapter, the court shall dismiss the action upon motion for summary judgment if it shall find, pursuant to Rule 56 of the Rules of Civil Procedure, that no genuine issue of fact exists as to one or more of the facts required to be proved by the provisions of the preceding paragraph (ii) ~~do not exist~~, and the court shall dismiss the action upon a timely motion for a directed verdict against the plaintiff if after considering all the evidence and every inference legitimately and reasonably raised thereby most favorably to the plaintiff, the court shall determine that there is not sufficient evidence to find each and every one of the facts require to be proven by the provisions of subparagraphs (A) through (F) of the preceding paragraph (ii); . . . .[173]

173. This proposed legislation is based upon W. VA. CODE § 23-4-2(c) (Supp. 1991).

VI. CONCLUSION

Mayles v. Shoney's, Inc. establishes a very broad exception to the immunity from tort liability granted to employers pursuant to the West Virginia Worker's Compensation Act.[174] The *Mayles* court's interpretation of the "deliberate intention" exception ignores express legislative intent[175] and is premised upon a highly questionable reading of the substantive language of the relevant statute.[176] The holding of *Mayles* appears to establish that employers may be liable in tort to injured employees for conduct that does not rise above ordinary negligence.[177] The West Virginia Legislature appears to have intended to preserve an injured employee's ability to hold an employer liable for willful, wanton, or reckless conduct in circumstances in which the five-part test is also satisfied.[178] The legislature did not intend to allow an employee to recover for willful, wanton, or reckless employer misconduct in circumstances in which the five-part test was not satisfied.[179] Furthermore, the legislature clearly intended that an employer's conduct would have to be willful, wanton, and reckless, not merely negligent, to satisfy the five-part test.[180] This decision by the legislature has been disregarded by the West Virginia Supreme Court of Appeals.[181] Thus, legislation will be necessary in order to reestablish the policy intended by the legislature. The legislative proposal outlined herein is intended to follow the intent of the 1983 amendment of *W. Va Code* § 23-4-2,[182] and to be as resistant as possible to misinterpretation by the courts.

David O. Schles

174. *Mayles*, 405 S.E.2d at 23.
175. *See* W. VA. CODE § 23-4-2(c)(1) (Supp. 1991).
176. *See* W. VA. CODE § 23-4-2(c) (Supp. 1991).
177. *Mayles*, 405 S.E.2d at 23.
178. *See* W. VA. CODE § 23-4-2(c) (Supp. 1991).
179. *Id.*
180. *Id.*
181. *See Mayles*, 405 S.E.2d at 15.
182. 1983 W. Va. Acts 1040.